No. 90-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MCI COMMUNICATIONS CORPORATION, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, CONSUMER FEDERATION OF AMERICA, ENHANCED SERVICES COUNCIL, ALARM INDUSTRY COMMUNICATIONS COMMITTEE, ADAPSO, THE COMPUTER SOFTWARE AND SERVICES INDUSTRY ASSOCIATION, INC., INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC., TANDY CORPORATION, PHONE PROGRAMS, INC., OHIO CONSUMERS' COUNSEL, NATIONAL TELECOMMUNICATIONS NETWORK, MARYLAND PEOPLE'S COUNSEL, RADIOFONE, INC., AD HOC TELECOMMUNICATIONS USERS COMMITTEE, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA, BELL ATLANTIC CORPORATION, AMERITECH, NYNEX CORPORATION, SOUTHWESTERN BELL CORPORATION, BELLSOUTH CORPORATION, PACIFIC TELESIS GROUP, U S WEST, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in replacing express language in the AT&T consent decree with its own "flexible" test for removal of critical, procompetitive restrictions on the business activities of telephone company monopolies.

2. Whether the Court of Appeals, in acknowledged conflict with other federal appellate courts, failed to accord appropriate deference to the conclusions of the district court concerning consent decree language that the district court drafted, interpreted and consistently applied over many years.

RULE 14.1(b) AND RULE 29.1 STATEMENTS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the list of parties in the Court of Appeals whose judgment is sought to be reviewed, is as follows:

American Information Technologies Corporation
Bell Atlantic Corporation
BellSouth Corporation
NYNEX Corporation
Pacific Telesis Group
Southwestern Bell Corporation
U S West, Inc.
United States of America
Federal Communications Corporation
MCI Communications Corporation
American Telephone and Telegraph Company
Consumer Federation of America
ADAPSO, The Computer Software and Services Industry Association, Inc.
North American Telecommunications Association
American Newspaper Publishers Association
Ad Hoc Telecommunications Users Committee
The Dunn & Bradstreet Corporation
Telecommunications Industry Association
National Association of Broadcasters
Independent Data Communications Manufacturers Association, Inc.
Phone Programs, Inc.
Tandy Corporation
Maryland People's Counsel
Comcast Cellular Communications, Inc.
Cybertel Corporation
Cox Enterprises, Inc.
Enhanced Services Council
National Telecommunications Network
National Cable Television Association, Inc.
US Sprint Communications Company

Leghorn Telepublishing Company
Direct Marketing Association
Ohio Consumers' Counsel
CompuServe Incorporated
McCaw Cellular Communications, Inc.
Radiofone, Inc.
Alarm Industry Communications Committee
Tymnet-McDonnell Douglas Network Systems Company
Competitive Telecommunications Association
Public Service Commission of the District of Columbia
People of the State of California, et al.
United States Telephone Association
General Electric Communications and Services
American Cellular Network Corporation
Digital Directory Assistance, Inc.
David Systems, Inc.
Florida Public Service Commission
The Media Institute
Leghorn Telepublishing Company
Hayes Microcomputer Products, Inc.
National Consumer League
Black Citizens for a Fair Media
The Council of Churches of New York City
National Association of State Universities and Land Grant Colleges
Native American Public Broadcasting Consortium
The National Indian Youth Council
Office of Communications of the Church Federation of Greater Chicago
Consumer Interest Research Institute
Public Interest Computer Association
National Association for Better Broadcasting

Pursuant to Rule 29.1 of the Rules of this Court, petitioners state as follows:

MCI Communications Corporation provides long distance and information services. It has no parent com-

pany, and its only non-wholly owned subsidiary is Philippines Global Communications, Inc.

ADAPSO is the principal trade association of the computer software and services industry. It has no parent company or non-wholly owned subsidiary.

The Ad Hoc Telecommunications Users Committee is an unincorporated entity which represents the interests of its members in telecommunications matters before the Federal Communications Commission, federal courts and state regulatory authorities. It has no parent company or non-wholly owned subsidiary.

Independent Data Communications Manufacturers Association, Inc., (IDCMA) is a trade association of manufacturers of equipment used for computer (data) communications. It has no parent company or non-wholly owned subsidiary.

Competitive Telecommunications Association (Comp-Tel) is a national industry association of competitive long-distance telephone carriers. It has no parent company or non-wholly owned subsidiary.

Phone Programs is a New York corporation which does business, *inter alia*, as an information provider. It has no parent company or non-wholly owned subsidiary.

Tandy Corporation is a manufacturer and retailer of telecommunications and electronic consumer products. It has no parent company or non-wholly owned subsidiary.

Maryland People's Counsel is a public agency of the State of Maryland that is authorized by statute to appear before courts and federal or state agencies on behalf of residential and noncommercial users of telephone and other regulated utility services. It has no parent company or non-wholly owned subsidiary.

Enhanced Services Council is a non-profit association formed for the purpose of ensuring the development of

fair Open Network Architecture standards. It has no parent company or non-wholly owned subsidiary.

National Telecommunications Network is a joint venture for several long-distance carriers. It has no parent company or non-wholly owned subsidiary.

The Ohio Consumers' Counsel is the statutory representative of Ohio's residential utility customers, including telephone customers. It has no parent company or non-wholly owned subsidiary.

Consumer Federation of America is a non-profit corporation consisting of local, state and national non-profit entities, whose purpose includes promoting the interests and rights of consumers. It has no parent company or non-wholly owned subsidiary.

The American Newspaper Publishers Association (ANPA) is an incorporated trade association of about 1,400 member newspapers which account for about ninety percent of the total daily and Sunday newspaper circulation in the United States. It has no parent company or non-wholly owned subsidiary.

Alarm Industry Communications Committee is a subcommittee of the Central Station Alarm Association, a trade association. It has no parent company or non-wholly owned subsidiary.

Radiofone, Inc., is a Louisiana corporation providing radio common carrier service to the public in various markets throughout the State of Louisiana. It has no parent company or non-wholly owned subsidiary.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 900 F.2d 283, and is reprinted at pages 1a to 59a of the Ap-

pendix to this Petition ("App.").[1] The opinions of the United States District Court for the District of Columbia, from which appeal was taken, are reported at 673 F. Supp. 525, and 714 F. Supp. 1, and are reprinted at App. 62a-108a, and App. 109a-273a.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 1990. App. 60a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

15 U.S.C. § 2, which provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 16(e), which provides:

> Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—
>
> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

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[1] The Appendix is bound as a separate volume.

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

STATEMENT OF THE CASE

This case involves the consent decree that broke up the Bell System, perhaps the most important decree ever entered under the Sherman Act. Besides a massive divestiture, the decree established structural remedies to protect competitive markets from future abuse by the new owners of AT&T's local telephone monopolies. These remedies included restrictions against the divested Bell Companies' entry into lines of business vulnerable to their monopoly power.

The decree capped decades of Government and private litigation. Few industries have witnessed such a prolonged struggle to redress persistent antitrust abuses. To ensure that the remedy would endure, the decree directed that the line-of-business restrictions imposed on the divested Bell Companies would be removed only upon a showing "that there is no substantial possibility that the petitioning [Bell Company] could use its monopoly power to impede competition in the market it seeks to enter."

This Court affirmed the 1982 district court order that imposed the line-of-business restrictions and established the standard for their removal. *Maryland v. United States*, 460 U.S. 1001 (1983). In the decision below, however, the Court of Appeals for the District of Columbia Circuit disregarded the decree's express standard and substituted its own indefinite and "flexible" test for removing one of the decree's line-of-business restrictions.

The decision below conflicts with this Court's precedent and with decisions of other courts of appeals. The decision also raises important and unresolved questions about

the standards under which appellate courts review district court administration of consent decrees. Most importantly, the appellate court's ruling threatens to dislocate coherent enforcement of competitive protections that affect the daily lives of most Americans, as well as billions of dollars of annual investment in "a vast and crucial sector of the economy." [2] Review by this Court is critical to ensure that the hard-won consumer benefits of this landmark decree do not succumb to renewed abuse of the local telephone bottleneck.

A. The Decree

For over a century, the Bell System dominated the provision of telephone services and equipment in the United States. This nationwide vertically integrated enterprise was constructed on the foundation of the Bell Companies' local telephone monopolies. To restrain abuse of that monopoly power, the Government brought a civil action in 1949 to divest AT&T of subsidiaries that manufactured telecommunications equipment. However, in 1956 the Department of Justice agreed to what has been termed "a token settlement." [3] Thus, neither that action nor a multitude of private antitrust actions diminished the Bell System's dominance of the telecommunications industry and its related markets.[4]

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[2] *United States v. AT&T*, 552 F. Supp. 131, 152 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[3] Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess. 55 (1959). This and similar failures of antitrust enforcement eventually led to passage of the Tunney Act, which requires district courts to serve as an "independent check upon the terms of decrees n gotiated by the Department of Justice," to determine whether they are in the "public interest" before they are approved and entered. *See* 552 F. Supp. at 149 & n.75; 15 U.S.C. § 16(e).

[4] *See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) (affirming jury finding that AT&T unlawfully monopolized intercity

The 1982 consent decree resolved a fresh civil action brought by the United States in 1974 to address the intractable anticompetitive practices arising from the Bell System's local bottleneck monopolies. The Government alleged that the Bell System had broadly used its bottleneck control to undercut competition by marketplace rivals. Specifically, the Government claimed that the Bell Companies had refused competitors access to local telephone networks, refused or hindered connection of non-AT&T equipment, and precluded the sale of competitors' equipment to the Bell Companies.[5] The gravamen of the Government's case was that this bottleneck abuse harmed consumer welfare by denying competitors the opportunity to compete on the basis of price and quality and thus restricted production and created dead weight losses to society. To maximize output and open markets to competition and innovation, the Government sought to divest the competitive portions of AT&T from the monopoly portions and to preclude the monopoly portions from participating in competitive markets where they were likely to abuse their bottleneck power.[6]

The Government's action came to trial in early 1981. In January 1982, near the trial's conclusion, the Gov-

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long-distance market); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 487 F. Supp. 942 (S.D.N.Y. 1981), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) (affirming jury finding that AT&T unlawfully monopolized telecommunication equipment markets). In all, more than 70 private antitrust suits "set forth a broad array of charges that the Bell System had abused local bottlenecks to impede or foreclose competition by long distance carriers, equipment manufacturers, and others." AT&T's Comments on the Report and Recommendation of the United States, at 15 (filed Mar. 13, 1987).

[5] Complaint, *United States v. AT&T*, Civil Action No. 74-1698 (D.D.C., filed Nov. 20, 1974).

[6] Response of the United States to Public Comments on Proposed Modification of Final Judgment, 47 Fed. Reg. 23320, 23325 (1982).

ernment and AT&T announced a settlement. 552 F. Supp. at 152. The consent decree proposed by AT&T and Assistant Attorney General William F. Baxter essentially granted the relief sought by the Government.[7] To remedy the anticompetitive conduct stemming from AT&T's control of the Bell Companies' local telephone service monopolies, AT&T agreed to divest itself of the Bell Companies (sometimes called "Bell Operating Companies" or "BOCs").[8] In turn, the divested Bell Companies were to be restricted from engaging in businesses that could be controlled by the local bottleneck. These forbidden businesses were: (1) providing interexchange (long-distance) telephone service; (2) manufacturing telecommunications equipment; (3) offering information services, such as Lexis and Westlaw, that are accessed by telephone lines; and (4) providing any other product or service that was not a natural monopoly service actually regulated by tariff. 552 F.Supp. at 227-228.

The district court undertook an extensive Tunney Act review to determine whether the proposed decree was in the public interest.[9] The court granted interested persons rights to participate "which for all intents and purposes [were] equal to those possessed . . . by the parties" to the underlying case.[10] After reviewing thousands of

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[7] As a formal matter, the settlement was implemented as a "modification" of the 1956 consent decree. Hence, the order ultimately entered by the district court was termed a "Modification of Final Judgment," sometimes referred to as "MFJ." 552 F. Supp. at 141 n.131.

[8] The 22 Bell Companies were divested to seven Regional Holding Companies. Bell Atlantic, the Regional Company for this part of the country, received Bell Companies such as the C&P Telephone Companies of D.C., Maryland, and Virginia.

[9] This review was initially contested by the Department and by AT&T, which tried instead to dismiss the 1974 case under Fed. R. Civ. P. 41(a). *See* note 3, *supra*. Although the district court did not pass specifically on the technical applicability of the Tunney Act, it applied the substantive Tunney Act procedures and standards. 552 F. Supp. at 145 & n.56.

[10] 552 F. Supp. at 218-19.

pages of comments and requiring several changes, the district court approved the proposed settlement. The court found the line-of-business restrictions to be necessary because participation in the forbidden businesses "carries with it a substantial risk that the [Bell Companies] will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors." 552 F.Supp. at 224.[11]

B. The Decree's Standard for Removing Restrictions

During the Tunney Act proceedings, the district court addressed future removal of the line-of-business restrictions. The proposed decree did not specifically refer to removal of the restrictions. The proposal did contain, as Section VII, a general provision common in consent decrees, which retained district court jurisdiction to enable:

> any of the parties . . . to apply . . . for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

552 F. Supp. at 231. The parties interpreted this proposed provision to mean that if they agreed upon removal of a line-of-business restriction, "the standard for such removal would be whether it is in the public interest." [12] If the parties did not agree, then the restrictions would be lifted upon a finding that the "rationale" for the restriction had become "outmoded" by technical developments. *See* 552 F. Supp. at 195.

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[11] The court also modified the line of business restrictions in ways not directly pertinent to this petition. 552 F. Supp. at 231-32.

[12] Brief for the United States in Response to the Court's Memorandum of May 25, 1982 at 32. *See* 900 F.2d at 306; App. 50a.

However, the district court ruled that "[t]o avoid any question about the appropriate test, the standard for removal of [line-of-business] restrictions should be explicitly incorporated into the decree." 552 F. Supp. at 195. The court's proposed Section VIII(C) thus provided:

> The restrictions imposed upon the separated BOCs by virtue of section II(D) [the line-of business restrictions], shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

552 F. Supp. at 195. The district court's language made no distinction between contested and uncontested requests to remove the restrictions, as had been suggested by the parties in interpreting Section VII. The parties agreed to include Section VIII(C) in the final consent decree. *United States v. Western Electric*, 592 F. Supp. 846, 852 (D.D.C. 1984).

C. The Role of the Court, the Original Parties and Intervenors in Enforcing the Decree.

Warned that administration of the decree should not depend solely on the original parties' initiatives, the district court conditioned Tunney Act approval on the parties' explicit consent to the court's acting *sua sponte* to enforce the decree.[13] Similarly, the court from time to time granted non-parties, including petitioners here, formal intervening party status to participate in important

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[13] The parties agreed to the addition of Section VIII(I), App. 287a which provides:

> The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

consent decree proceedings, including the proceedings at issue in this Petition.[14]

D. Proceedings to Change the Line-of-Business Restrictions Under Section VIII(C)

After entry of the decree, the Bell Companies made numerous requests to remove or waive the decree's line-of-business restrictions as applied to specific transactions or arrangements. Over 130 such requests were moved and considered under Section VIII(C) of the decree. The requests were brought by Bell Companies and in certain cases by the government as well.[15] The overwhelming majority of these motions were not contested by original parties to the decree, and some were not contested by intervenors. Whether contested or not, these motions were evaluated—without objection—under Section VIII(C).

Further motions to remove line of business restrictions occurred in the proceeding under review. The Department of Justice had undertaken to report to the district court on the third anniversary of divestiture (and triennially thereafter) whether changes in the marketplace had elim-

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[14] *United States v. Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Feb. 4, 1987). Nonoriginal parties were active participants in both the briefing and oral argument of Bell Company motions to modify the decree's line-of-business restrictions. In the triennial review proceedings, for example, a "total of some 170 organizations and individuals availed themselves of the opportunity to intervene" and comment on proposals to modify the line-of-business restrictions. 673 F. Supp. at 529; *see also* 552 F. Supp. at 219 (granting intervenor status for proceedings on AT&T's plan of reorganization).

[15] In 1984 the district court ruled that *all* Bell Company requests for removal under Section VIII(C) should first be reviewed by the Department and then presented to the Court as a Department motion under Section VIII(C). *United States v. Western Elec. Co.*, 592 F. Supp. 846 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985). This ruling did not suggest any change of the burden on the petitioning Bell Company to make the showing Section VIII(C) requires.

inated the need for the line-of-business restrictions.[16] In 1987, the Government made its first triennial report and the district court held extensive proceedings on the report and related motions.

In this triennial review proceeding, the Bell Companies and the Government moved *pursuant to Section VIII(C)* for removal of the information services restriction at issue here.[17] Numerous intervening parties opposed this removal. AT&T did not. Stating that it did not participate in the information services market, AT&T announced that it would take no position on the requests to remove the information services restriction.[18] It acknowl-

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[16] Response of the United States to Public Comments on Proposed Modification of Final Judgment, at 62 (filed May 20, 1982); *see* 552 F. Supp. at 195.

[17] Ameritech's Motion For Removal of Certain of the Decree's Line-Of-Business Restrictions (filed Apr. 24, 1987) (App. 298a); Motion of Bell Atlantic to Remove Portions of the Line of Business Restrictions Contained in the AT&T Consent Decree (filed Apr. 24, 1987) (App. 291a); BellSouth Corporation's Motion For Relief Under Section II(D) of the Modification Of Final Judgment (filed Apr. 27, 1987) (App. 293a); Motion of NYNEX Corp. to Remove Restrictions Imposed By Section II(D) Of The Modification Of Final Judgment (filed Apr. 27, 1987) (App. 295a); Motion of Pacific Telesis Group For Waiver of the Line Of Business Restrictions (filed Apr. 27, 1987) (App. 297a); Motion of Southwestern Bell Corporation For Removal of Certain Of The Restrictions Of Section II(D) Of the Modification Of Final Judgment (filed Apr. 27, 1987) (App. 299a); Motion of U S West, Inc. For Relief From Line Of Business Restrictions Imposed By Section II(D) Of The Modification Of Final Judgment (filed Apr. 27, 1987) (App. 305a); Motion Of The United States For Partial Removal Of The Line-Of-Business Restrictions Imposed On The Bell Operating Companies By the Modification Of Final Judgment (filed Apr. 27, 1987) (App. 308a).

[18] Transcript of District Court Hearing, July 1, 1987, at 315; AT&T's Comments on the Report and Recommendations of the United States, March 13, 1987, at 111. At the time of the triennial review proceedings, AT&T was itself prohibited by the decree from offering certain information services known as "electronic publishing" services. *See* Section VIII(D) of the decree. App. 285a.

edged, however, that the case for complete relief under the applicable Section VIII(C) standard had not been made.[19]

E. The Decision of the District Court

After an extensive proceeding in which the proposed removals were vigorously contested by users and providers of information services, the district court denied the Section VIII(C) motions to remove the information services restriction.[20] The court found that the petitioning Bell Companies had not satisfied their Section VIII(C) burden of showing there was "no substantial possibility that the[y] could not, and indeed would not, use their monopoly power to impede competition in the information services market."[21] The court rejected a "curious observation" appearing in one Bell Company's reply brief that removal should be ordered "without regard to the Section VIII(C) requirements," and held instead that

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[19] AT&T's Comments on the Report and Recommendations of the United States, March 13, 1987, at 111. Because Section VIII(C) applied but could not be met, AT&T argued that if relief were to be granted at all, the Bell Companies would have to shoulder the burden, articulated in *United States v. Swift*, 286 U.S. 106, 118 (1932), of demonstrating that the very assumptions of the decree had been undermined by "unforeseen circumstances." AT&T's Reply Comments on the Report and Recommendations of the United States, May 22, 1987, at 17-18. The Bell Companies made no attempt to demonstrate unforeseen circumstances required to modify the decree structure itself.

[20] The court also denied the motions to remove the decree's long distance and manufacturing restrictions. *United States v. Western Electric Co.*, 673 F. Supp. at 552, 562.

[21] 673 F. Supp. at 565. The court did grant motions to vacate the decree's restriction against "non-natural monopoly" services, and it modified the information services restriction to permit Bell Companies to offer "information service gateways." 673 F. Supp. at 587, 599.

"the decree contains a specific standard for modification or removal of its provisions." [22]

F. The Decision of the Court of Appeals

The Department of Justice and the Bell Companies appealed. Challenging the district court's interpretation of Section VIII(C) itself, the Department did not argue that any other standard should govern. Indeed, at oral argument before the court of appeals, the Department reaffirmed that: "We moved below under VIII(C) all the waivers that we had recommended to the court, again under VIII(C)." [23] The Bell Companies, despite having moved under Section VIII(C), argued that the district court should not have applied Section VIII(C)'s standard to the proposed removal of the information services restriction.

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[22] 673 F. Supp. at 534 n.34. BellSouth Corporation argued that Section VIII(C) was not applicable "[w]here the Government recommends the modification or termination of a consent decree, and where the parties to the original proceeding consent to that recommendation." BellSouth Corporation Response To Comments On The Justice Department Recommendations And Memorandum In Support Of Motion For Relief From Section II(D) Of The Modification Of Final Judgment, April 27, 1987, at 2. Despite this argument, BellSouth itself moved for removal of the restriction "pursuant to Section VIII(C)" (App. 293a), and never amended its motion. In responding to BellSouth's argument, the district court observed:

> the law is that "the parties [can] not become the conscience of the equity court and decide for all what [is] equitable and what is not, because the court [is] not acting to enforce a promise but to enforce a statute," *System Federation v. Wright*, 364 U.S. 642, 652-53, 81 S.Ct. 368, 374, 5 L.Ed.2d 349 (1961), a rule particularly applicable where the decree contains a specific standard for modification or removal of its provisions.

673 F. Supp. at 534 n.34.

[23] Transcript of Oral Argument, at 25; *see generally id.* at 24-29 (Dec. 6, 1989). The Department also advised that since the decree was entered, "the government has repeatedly moved under VIII(C), in an effort to fulfill the terms that it provides." *Id.* at 28.

On April 3, 1990, the court of appeals issued a *per curiam* decision remanding for further proceedings on the decree's information services restriction. *United States v. Western Electric Co.*, 900 F.2d 283, 305-309 (D.C. Cir. 1990); App. 46a-56a.[24] The court held that the district court committed reversible error when it applied the test of Section VIII(C)—the only test cited in the motions of the moving parties. The court of appeals first opined that the language of Section VIII(C) "appears to contemplate adversarial testing." 900 F.2d at 306; App. 49a. The court further concluded that Section VIII(C) applied only to motions challenged by an original party. 900 F.2d at 306; App. 49a-50a; *see also* 900 F.2d at 305-306; App. 47a-49a.[25] Because AT&T did not oppose the Bell Companies' motion to remove the information services restriction, the appellate court concluded that the "district court erred in applying Section VIII(C)." 900 F.2d at 309; App. 55a.

Announcing that it would reject the rule of deference "apparently embraced by other circuits," the appellate panel gave no special weight to the district court's interpretation of its own explicit standard for removal of restrictions. 900 F.2d at 294; App. 24a. The appellate court did not even mention the district court's consistent application of Section VIII(C) to petitions for waiver of the restrictions, including petitions uncontested by any original or intervening party.

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[24] The appellate court affirmed the district court's rulings on long distance services and manufacturing. 900 F.2d at 300-305; App. 37a-46a.

[25] Although the issue was not presented, the appeals court also suggested that the Government cannot properly move under Section VIII(C) to change the line-of-business restrictions. 900 F.2d at 294; App. 25a. The appeals court declined to clarify what standard would apply to government motions to modify the line-of-business restrictions. 900 F.2d at 294 n.12; App. 25a.

In place of Section VIII(C)'s explicit standard, the court of appeals imposed a "public interest" test with a principal characteristic of "*flexibility.*" 900 F.2d at 309 (emphasis in original); App. 55a. The court deduced this test from the original parties' comments about the proper removal standard, views that were expressed prior to Section VIII(C)'s creation.[26] 900 F.2d at 306; App. 50a.

Although the court of appeals' flexible test "must take its meaning from the nation's antitrust laws," that standard "is surely more far-ranging than the section VIII(C) standard." 900 F.2d at 299, 308 (citation omitted); App. 53a-54a. Under this flexible test, the district court was instructed to engage in a "*de novo* assessment of the evidence" and "further factfinding" in determining whether to lift the information services restriction. 900 F.2d at 308, 309; App. 53a, 55a. The newly-fashioned "public interest" test "allows the district court to approve an uncontested modification even without a showing of a 'change' of any kind" in the market conditions that the parties agreed necessitated the restrictions when the judgment was entered. 900 F.2d at 306 (footnote omitted); App. 49a.

Consumer groups, associations, information services companies and other intervenors below filed this petition for certiorari.

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[26] 552 F. Supp. at 195.

REASONS FOR GRANTING THE WRIT

The District of Columbia Circuit decided an issue of fundamental importance to competition and consumers in a way that is inconsistent with the decision of this Court in *United States v. Atlantic Refining Company*, 360 U.S. 19 (1959). The decision also conflicts, in letter and spirit, with numerous appellate court decisions that accord deference to district court interpretations of consent decrees.

A reviewing court must honor the language of a decree, the practice of the parties consistent with that language, and the trial court's factual determination of the parties' intent. By exempting certain petitions from the decree's explicit provision for removing restrictions, the court of appeals flouted not only the decree's express language but also the fundamental purpose served by inserting that provision in the first place. The district court "explicitly incorporated" that provision "[t]o avoid any question about the appropriate test" for removal of restrictions. 552 F. Supp. at 195. In rejecting Section VIII(C)'s clear-cut standard and substituting its own vague formulation, the court of appeals resurrected the very question the decree sought to avoid.

The magnitude of dislocation risked by the court's startling reinterpretation of the decree makes review of this case a matter of pressing importance. Information services is a rapidly growing, multi-billion dollar industry. This growth depends on the decree's information services restriction, which addressed the risk that information services companies would face discrimination in reaching their customers through the bottleneck of local telephone services. The decree's guarantee of an open, competitive market in fact generated a wave of investment in new services and products by information services companies. The court of appeals' ruling jeopardizes this guarantee and the vigorous economic growth it has

spawned.[27] Moreover, the court of appeals' ruling clouds future enforcement of the long distance and manufacturing restrictions, since no one can predict beforehand whether a particular request to alter these restrictions will be judged under the Section VIII(C) standard or some different one.

This Court should not defer resolution of these questions. The court of appeals observed that "[w]hether section VII or section VIII(C) governs an uncontested motion to modify [the-line-of-business restrictions] is not a mere academic question." 900 F.2d at 306; App. 49a. The Bell Companies have claimed that the court of appeals' decision is "a virtual directive to Judge Greene to let the regional Bells enter the information services market."[28] Application of the new standard imposed by the court of appeals will alter the conduct of ongoing proceedings in this far-reaching antitrust case. The questions presented involve clear-cut issues of law that do not depend on future factual developments. The record is complete, and principles of judicial economy and fairness to the parties strongly militate in favor of immediate review.[29]

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[27] Just three years after the decree became effective, the record before the district court indicated that "the United States has the world's largest, most successful, and most sophisticated information services industry." Comments of ADAPSO (The Computer Software And Services Association), at 47 (filed Mar. 13, 1987). American consumer databases had an annual growth rate of 76% in the years following approval of the decree. Opposition of CompuServe, Inc., at 23 (Mar. 13, 1987). The Department of Justice's consultant in the triennial review found "thousands of national databases, numerous providers of national electronic mail services, and dozens of large timesharing firms." P. Huber, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry*, at 6.12 (Jan. 1987).

[28] *Washington Post*, April 4, 1990, at C-1.

[29] *See United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *Larson v.*

1. In *United States v. Atlantic Refining Company*, 360 U.S. 19 (1959), this Court held that a reviewing court should affirm the district court's interpretation of a consent decree provision

> where the language of a consent decree in its normal meaning supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended.

360 U.S. at 23-24. The court of appeals' decision is flatly inconsistent with *Atlantic Refining*.

First, the "normal meaning" of Section VIII(C)'s language supports the district court's application of that section to uncontested as well as contested removal requests. Section VIII(C) states the terms on which "[t]he restrictions imposed upon the separated BOCs . . . shall be removed." Modification of Final Judgment, App. 274a, 285a. Section VIII(C)'s plain language extends to any petition to remove these restrictions.

To reach a contrary result, the court of appeals seized on Section VIII(C)'s requirement of a "showing by a petitioning BOC." The Court interpreted this language as indicating "that [Section VIII(C)] applies only to contested motions for removal" because it "appears to contemplate adversarial testing." 900 F.2d at 295, 306; App. 26a, 49a.

However, the phrase "showing by a petitioning BOC" does not limit Section VIII(C) to contested removal petitions. "Petitioning BOC" simply refers to the Bell Company that wants the relief. Any party seeking relief from a court must petition, or the court will not act. Many, if not most, petitions in our court system are unopposed. Further, courts routinely require a "show-

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Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949). *See also Michael v. United States*, 454 U.S. 950, 951-952 (1981) (White, J., dissenting from denial of certiorari).

ing" that even unopposed petitions are appropriate under applicable law. Therefore, the court of appeals had no basis for confining Section VIII(C) to contested petitions. *See United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984) (holding virtually identical decree language did not exempt uncontested petitions to remove restrictions).[30]

The court of appeals not only derived an "adversariness" requirement from Section VIII(C)'s language, but it also mandated that this adversariness could be provided only by original decree parties. The appeals court's flawed logic thus drove it to find the information services motions "unopposed" despite fierce opposition to them by numerous parties that had been granted full rights to participate as intervenors. The language of Section VIII(C) cannot be stretched to support the court of appeals' conclusion.

Second, the appellate court ignored six years of history that flatly contradicts the court's strained distinction between contested and uncontested petitions.[31] More than

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[30] The consent decree in that case provided for removal of certain injunctive provisions upon "a showing by Cyanamid" that "the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country." 719 F.2d at 561. Cyanamid and the government jointly argued that this provision did not apply to uncontested modifications, and that a less demanding "public interest" standard should govern. *Id.* The Second Circuit rejected that argument on the ground that the decree's plain language did not purport to exempt uncontested petitions from the decree's express test for modification.

The decree provisions in this case are indistinguishable. In both cases, the decrees: (i) provided an express standard for removing restrictions; (ii) contemplated a petition to the court for relief; (iii) did not explicitly exempt uncontested petitions from the express standard; and (iv) contained a separate provision retaining jurisdiction in the district court to modify the decree.

[31] The court of appeals need not and should not have gone beyond the normal meaning of the decree's language. But once it did so, it should not have disregarded what the parties did after agreeing to the decree.

one hundred thirty petitions to waive or remove line-of-business restrictions have been reviewed under Section VIII(C). All but a handful were uncontested by any original decree party. Yet each was resolved under Section VIII(C) *without any objection* to application of the Section VIII(C) standard. Indeed, since the decree's adoption the Department of Justice and the Bell Companies have repeatedly advocated application of Section VIII(C) to line-of-business waiver or removal petitions, whether contested or uncontested.[32]

The court of appeals accorded no significance to this six year history, yet, as *Atlantic Refining* admonishes, the parties' unquestioning adherence to a district court interpretation of a consent decree is powerful evidence that the interpretation is the one intended. The court of appeals plainly erred when it altered a district court interpretation "adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start." 360 U.S. at 23-24.

Third, the court of appeals cavalierly reversed the district court's conclusion that "in fact" Section VIII(C) was intended to govern all requests to remove the line-of-business restrictions. In its triennial review decision, the district court rejected as "curious" the argument that the original parties' concurrence could withdraw the information services motions from Section VIII(C). 673 F. Supp. at 534 n.34. To the contrary, the district court observed, "the decree contains a specific standard [Section VIII(C)] for modification or removal", which the court must enforce regardless of the parties' agreement. *Id.*

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[32] Every motion under review in this proceeding is expressly based on Section VIII(C). To reach its intended result, the court of appeals found it necessary to fault the district court for adjudicating these requests under the very standard that the moving parties invoked. *See* p. 10 *supra* and note 17.

Not only did the court of appeals fail to treat the district court's conclusion about the intent of Section VIII(C) as a factual finding, it declined to give any deference to the views of the district court, even though the district court wrote Section VIII(C), incorporated it as a condition of entry of the decree, and interpreted it repeatedly during administration of the decree. The court of appeals unabashedly rejected "the suggestion . . . that this particular district judge's interpretations should be afforded some 'special' deference because he drafted the pivotal provision of the decree, Section VIII(C), and because he has had enormous experience overseeing the case and the decree since its inception." 900 F.2d at 294; App. 24a.

The decision below highlights the danger of an appellate court's refusal to defer to a district judge's long-standing familiarity with a complex consent decree. The appeals court seized on one passage of the district court's 1982 opinion as indicating the "circumstances surrounding formation of the decree," [33] but it ignored many other clear indications in the contemporaneous record that Section VIII(C) was intended to apply to both contested and uncontested removal applications.[34] For example, in adopting Section VIII(C), the district court made clear that "[t]o avoid *any* question about the appropriate test *the*

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[33] 900 F.2d at 306; App. 50a.

[34] The appeals court focused exclusively on the passage in the district court's opinion referring to a possible standard for opposed motions to remove restrictions, and concluded this was all Section VIII(C) was intended to cover. *See* 900 F.2d at 306; App. 50a, discussing 552 F. Supp. at 195 & n.266. However, just before the passage in question, the district court had observed that the decree should "contain a mechanism by which [the line of business restrictions] may be removed," an observation not limited to contested motions. 552 F. Supp. at 195. The paragraph cited by the court of appeals also contained references to the Justice Department's expected triennial reports, which might be contested or uncontested. *Id.*

standard for removal of restrictions should *be incorporated* into the decree." [35]

The court of appeals' indifference to the decree's plain language, six years of unquestioned interpretation, and the trial court's finding as to the intended scope of Section VIII(C) cannot be squared with this Court's decision in *Atlantic Refining*.

2. Review by this Court is also needed to clarify the standards appellate courts should apply when reviewing a district court's interpretation of a consent decree. In the present case, the court of appeals took an extremely activist approach to reviewing the district court's order. In its view, the proper standard was review *de novo*, and application of this standard left no room for deference to the interpretation of the district court that drafted the provision at issue and applied that interpretation, without objection, for many years.

The court of appeals' decision on the proper scope of review conflicts with the law of several other circuits—as the court of appeals itself acknowledged. 900 F.2d at 294; App. 24a. In an illustrative case cited below, *see* 900 F.2d at 294; App. 24a, the Ninth Circuit applied a

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[35] 552 F. Supp. at 195 (emphasis added; footnote omitted). The court of appeals did not mention other important indicia that the original parties' consent would not be given dispositive weight in choosing a removal standard. First, Section VIII(C) originated in the district court's Tunney Act duties to serve as an "independent check upon decrees negotiated by the Department of Justice." 552 F. Supp. at 149. Next, the decree anticipates the possibility that AT&T and the Bell Companies might share economic interests and includes a number of provisions designed to prevent the Bell Companies from favoring AT&T. Modification of Final Judgment, Sections II(A), II(B), IV(F), Appendix B(A)(1); App. 276a, 278a-279a. Finally, the district court's insertion of Section VIII(I), retaining jurisdiction to enforce the decree *sua sponte*, evidences a concern about improper collusion among the original parties that is totally at variance with the court of appeals' conclusion.

contrary rule in cases where the district judge oversaw the litigation resulting in the decree: "In light of the district court's extensive experience with the case and the decree, we should give special deference to its conclusions about the meaning of the decree." *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986).[36] At least three other circuits also follow a rule contrary to that applied by the court of appeals in this case.[37]

This divergence is evidence of a conceptual problem arising from this Court's statement in *Armour* that a consent decree should be treated "essentially as . . . a contract."[38] Many courts, including the court of appeals here, have read *Armour* as suggesting that all district court interpretations of consent decree provisions are to be reviewed *de novo*.[39] But *Armour* merely admonished

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[36] *Accord Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 893 (9th Cir. 1982) (deference given to the district court's interpretation of a consent decree because "the district judge oversaw the entire litigation process, from the filing of the original complaint . . . through the consent judgment, to his subsequent interpretation of that judgment.").

[37] *AMF, Incorporated v. Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983) (deference to district court's interpretation is due when the meaning of a consent decree is "fairly open to debate"); *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981) (district court's interpretation of a consent decree "deserve[s] deference" because "[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it."); *Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984) (district court's "views on interpretation [of a consent decree] are entitled to deference"); *United States v. Board of Educ. of the City of Chicago*, 717 F.2d 378, 382 (7th Cir. 1983); *cf. South v. Rowe*, 759 F.2d 610, 613 n.4 (7th Cir. 1985).

[38] *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971) (quoted at 900 F.2d 293; App. 22a).

[39] 900 F.2d at 293; App. 22a. Indeed, even courts that defer to district court interpretations of consent decrees pay lip service to the idea that a *de novo* standard of review applies. *See, e.g., Keith v. Volpe*, 784 F.2d at 1461.

courts interpreting consent decrees to remain faithful to the intent of the parties that drafted decree provisions. *Armour* did not involve the appropriate standard of review at all, and in no sense required courts of appeals to forego the obvious wisdom of deferring to the understandings of a district court familiar with the making and administration of a decree.[40]

The *de novo* standard employed by the court of appeals also fails to account for the dual character of consent decrees, which are judicial orders as well as contracts. *See Local Number 93 v. City of Cleveland*, 478 U.S. 501, 519 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-237 (1975). Appellate courts routinely accord substantial deference to a district court's interpretation of orders the court itself has entered.[41]

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[40] Indeed, the court of appeals' understanding that *Armour* mandated pure *de novo* review because decrees are "essentially . . . contract[s]" (900 F.2d at 293; App. 22a) caused it to overlook the crucial difference in contract law between review of unambiguous terms, which is governed by a *de novo* standard, and review of ambiguous terms requiring resort to extrinsic evidence. Federal courts view the latter as questions of fact, and apply a "clearly erroneous" standard of review. *E.g., RCI Northeast Services Division v. Boston Edison Co.*, 822 F.2d 199, 202 (1st Cir. 1987); *Scarborough v. Ridgeway*, 726 F.2d 132 (4th Cir. 1984); *G & R Corporation v. American Security & Trust Co.*, 523 F.2d 1164, 1173 (D.C. Cir. 1975); *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1768 (1989); *Tri-State Petroleum Corp. v. Saber Energy Inc.*, 845 F.2d 575 (5th Cir. 1988). In this case the court of appeals found that Section VIII(C) was not clear on its face. 900 F.2d at 306; App. 49a. Although petitioners vigorously dispute the propriety of that conclusion, the appellate court should, at a minimum, have applied a deferential "clearly erroneous" standard of review of the district court's interpretation of Section VIII(C). Thus, to the extent the court of appeals purported to apply standards of review appropriate to contract law, its ruling conflicts with the prevailing standard of review in the federal courts.

[41] *See Vaughns v. Board of Educ. of Prince George's County*, 758 F.2d 983, 989 (4th Cir. 1985) (district court should be presumed

This deference is particularly fitting for decree provisions like the one here drafted by a district court and incorporated into a decree as a prerequisite to judicial approval.

Uncritical application of a *de novo* standard of review to the interpretation of consent decrees invites capricious results that can easily undermine the finality of decrees intended to put an end to litigation and to serve important public policy goals. It also threatens to arrogate too much power to appellate courts distant from the formation and administration of consent decrees. Sound judicial administration would be advanced were this Court to articulate standards of consent decree review that accommodate the particular character of enforcement decrees, that are sensitive to the origin and function of the language that is to be interpreted, and that are respectful of the efforts of district court judges to administer their decrees with coherence and fidelity to contemporaneous understandings that were the basis for the accords.

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to know the meaning of its own orders); *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 784 F.2d 831, 834-35 (7th Cir. 1986) ("The district court best knows the meaning of its own orders. The meaning of these documents is reasonably clear; even if it were not, we would defer to the district court's construction of them."); *In re Chicago, Rock Island and Pacific Railroad Co.*, 865 F.2d 807, 810 (7th Cir. 1988) (quoting *Arenson v. Chicago Mercantile Exch.*, 520 F.2d 722, 725 (7th Cir. 1975)) ("We shall not reverse a district court's interpretation of its own order 'unless the record clearly shows an abuse of discretion.' "); *In re Penn Central Transportation Co.*, 486 F.2d 519, 531 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974), ("[T]he district court's interpretation of its own order in the decision appealed from is entitled to great weight. We find no compelling basis to hold otherwise."); *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 499 (3d Cir. 1982) ("We must give particular deference to the district court's interpretation of its own order.").

CONCLUSION

Review by this Court is essential. Administration of the decree affects "a vast and crucial sector of the economy," and information service providers have crafted long-term plans and invested billions of dollars in reliance on the decree's express Section VIII(C) standard for removal of restrictions on the bottleneck monopolists. The court of appeals excised this standard and substituted its own "flexible" test. This Court should correct that error and announce a standard of review that will curb appellate disruption of consent decrees.

For all the foregoing reasons, the petition for certiorari should be granted.

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